

1 RECORD OF ORAL HEARING

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3 UNITED STATES PATENT AND TRADEMARK OFFICE

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6 BEFORE THE BOARD OF PATENT APPEALS
7 AND INTERFERENCES

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10 Ex parte LARRY D. SIMON

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13 Appeal 2007-0281

14 Application 10/044,073

15 Technology Center 1700

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18 Oral Hearing Held: February 6, 2007

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22 Before TONI R. SCHEINER, ERIC GRIMES, and NANCY J. LINCK,
23 Administrative Patent Judges

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26 ON BEHALF OF THE APPELLANT:

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28 BRIAN DAVIDSON, ESQUIRE

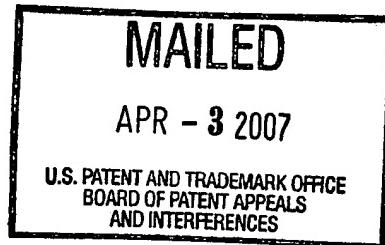
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1 The above-entitled matter came on for hearing on Tuesday,
2 February 6, 2007, commencing at 10:10 a.m., at The U.S. Patent and
3 Trademark Office, 600 Dulany Street, Alexandria, Virginia, before Christine
4 L. Loeser, Notary Public.

5 THE CLERK: Calendar number 6, appeal number 2007-0281,
6 Mr. Davidson.

7 JUDGE SCHEINER: Good morning.

8 MR. DAVIDSON: Good morning.

9 JUDGE SCHEINER: We have something new. For now on,
10 we have a court reporter for ex parte cases, too.

11 MR. DAVIDSON: Just out of curiosity, may the applicant
12 have a transcript?

13 JUDGE GRIMES: The plan, I think, is for the transcripts to be
14 made part of the official image file wrapper. I think they would be able to
15 access it.

16 MR. DAVIDSON: Very good. Thank you.

17 My name is Brian Davidson. Good morning. I sincerely
18 appreciate the opportunity to be heard this morning. I represent the
19 applicant, Larry Simon.

20 What we are dealing with today is a medium to preferentially
21 separate red blood cells, and if I can indulge the board, I'll use red blood
22 cells and white blood cells for ease of reference.

23 I believe there are some fundamental misunderstandings and
24 misconceptions that are in the record here that have led to clearly erroneous
25 rejections of record.

1 What the applicant's invention is, in essence, is a combination
2 mixture of, in a nonwoven web, of staple fibers, nonfibrillated staple fibers
3 on the one hand mixed with fibrillated staple fibers on the other hand. Both
4 are staple fibers.

5 Without going into much detail, it's all in the briefs, but
6 fibrillation, of course, is the amount or degree of fibrils associated with the
7 staple fiber. What the applicants have found, that such a mixture will
8 preferentially -- such a mixture of synthetic staple fibers will preferentially
9 separate red blood cells from other constituents in whole blood.

10 The examiners essentially combined two references. I'll leave
11 for the moment, for the record, anyway, the use of applicant's own
12 definitions against them. It's the Hagel reference and Baumgardner
13 reference.

14 The examiner, I believe, is pointing to Hagel for its disclosure
15 of blood separation, which includes a matrix fibers, which are glass fibers
16 and fibrillated particles.

17 I believe a fundamental misunderstanding here is that the
18 examiner is looking at Hagel and the disclosure of fibrillated particles and
19 somehow connoting that to be equivalent to fibrillated fibers. That is not the
20 case.

21 And in fact, I would like to direct the board's attention to
22 column 12, lines 59 to 61 in Hagel where they describe the particles. It says,
23 The particles are not fibers and cannot be spun into a yarn, i.e., are not
24 textile fibers, e.g., of staple length.

1 Hagel specifically says their particles, their fibrillated particles
2 are not staple fibers. Also, Hagel teaches that if one wants to preferentially
3 separate white blood cells, not red blood cells, then you need these
4 fibrillated particles in a matrix-fiber composite.

5 There's no disclosure at all of separating red blood cells
6 preferentially. In fact, Hagel specifically teaches against that by saying that
7 if you increase the amount of these fibrillated particles, you are going to
8 increase preferentially the separation of the white blood cells.

9 The examiner recognizes that deficiency. I don't believe,
10 however, he recognizes that they are particles. They are very different.
11 Hagel, also at column 12, line 65 says they are very, very small. They are
12 extremely small at line 65 of column 12, generally less on the order of 1 to
13 50 microns long. These are not staple fibers.

14 JUDGE GRIMES: That's talking about the fibrils on the
15 particles though, not the particles themselves, I think.

16 MR. DAVIDSON: I'm sorry. Yes. You are correct. The
17 particles, though, are not staple fibers. Thank you.

18 The other reference, combined with Hagel, is Baumgardner.
19 Baumgardner, in essence, teaches that a medium that can separate red blood
20 cells.

21 But Baumgardner, I believe, instructs the skilled person that in
22 order to separate those red blood cells, you need a combination of specific
23 fibers. You need glass fibers specifically in combination with cellulose
24 fibers. In fact, Baumgardner instructs that if glass fibers are not present, red
25 blood cells cannot be separated.

1 JUDGE LINCK: Your claims do not exclude. Your present
2 claims do you not exclude glass fibers and cellulose fibers?

3 MR. DAVIDSON: No, ma'am, they do not. The point is,
4 though, that nowhere in Baumgardner is there any suggestion that fibrillated
5 fibers may be used. So even if glass fibers are included in our mixture, it's
6 the fibrillated staple fibers in the applicant's invention which causes the red
7 blood cells to separate.

8 JUDGE LINCK: Baumgardner does use staple fibers.

9 MR. DAVIDSON: That's correct. Yes, ma'am. It's a
10 combination of staple fibers. It's our position that there's no suggestion in
11 either of these references of directing a skilled person towards fibrillated
12 staple fibers.

13 In fact, Hagel teaches the contrary. In our view, teaches against
14 the use of fibrillated staple fibers for separating red blood cells. If one
15 follows the logic that fibrillated particles separate white blood cells, then one
16 would not then go to fibrillated staple fibers and expect or let alone assume
17 that red blood cells could be separated.

18 JUDGE LINCK: Your application says you purchased these
19 fibrillated staple --

20 MR. DAVIDSON: Yes, ma'am.

21 JUDGE LINCK: -- fibers from a company, a commercial. I
22 know the examiner cited some undated commercial literature. But I was
23 curious at the time you purchased the fibers, the company would have had
24 some sort of disclosure of their fibers and uses of those fibers.

1 Was anything submitted to the examiner that disclosed what the
2 company at the time, if, in fact, the examiner's literature is undated and then
3 inappropriately used -- we'll assume it's inappropriately used -- is there other
4 literature describing those fibers from the company that's in the record?

5 MR. DAVIDSON: I do not know of any. I'm sorry?

6 JUDGE LINCK: Do you know if it's in the record?

7 MR. DAVIDSON: I don't believe that anything like that is in
8 the record in terms of what the art used these fibers for. It's so that there's no
9 document in the record which says the fibrillated staple fibers may be used
10 for ABC or whatever use may be out there.

11 JUDGE LINCK: I'd be very interested in seeing any literature
12 at the time the application was filed that describes the fibers since they were
13 a commercially-available fiber.

14 MR. DAVIDSON: Yes, ma'am. That's correct. We've never
15 contended that these fibrillated fibers were unknown. In fact, they were
16 commercially available.

17 What we are contending is that those fibrillated fibers,
18 combined with the nonfibrillated synthetic staple fibers caused this sort of
19 preferential separation of red blood cells from whole blood constituents.

20 That, to my knowledge at least, on this record, I don't believe
21 there's any suggestion there. To flip the coin and say what suggestion was
22 out there, I can't answer that.

23 JUDGE LINCK: If you could look into that, I would appreciate
24 it. I would like to know specifically, since what the examiner cited is being

1 questioned what exactly the company was saying about their fibers at the
2 time they were purchased for the invention.

3 MR. DAVIDSON: I would have to take that under advisement
4 at this moment. I don't want to overstate or misstate what may be because I
5 don't have the facts that may be in front of me. I could take that under
6 advisement and file a supplemental paper in that will help the board.

7 JUDGE LINCK: That would be all right.

8 JUDGE GRIMES: Never mind.

9 MR. DAVIDSON: So at least on this record, I believe there's a
10 teaching away by Hagel of directing anyone towards use of fibrillated staple
11 fibers by his description of fibrillated particles which he says are not staple
12 fibers and that are used to separate white blood cells.

13 Thank you for your time.

14 JUDGE SCHEINER: There was another rejection?

15 JUDGE GRIMES: No.

16 MR. DAVIDSON: No. Just one.

17 JUDGE SCHEINER: Just that one.

18 MR. DAVIDSON: Just procedurally then to answer your
19 question of a supplemental brief on this point.

20 JUDGE LINCK: Just to look into whether there was literature
21 accompanying the fibers at the time. It doesn't have to be a brief unless in
22 fact the literature suggests making a combination. I don't know -- we are
23 relatively new to practice. What is our normal procedure?

24 JUDGE SCHEINER: Well, we wouldn't normally entertain
25 something like that here.

1 MR. DAVIDSON: Perhaps on remand if needed.

2 JUDGE SCHEINER: Right.

3 MR. DAVIDSON: I'm not familiar with posthearing
4 submission.

5 JUDGE LINCK: You, of course, can submit it through the
6 normal process of submitting to the board of appeals.

7 MR. DAVIDSON: Okay.

8 JUDGE SCHEINER: It would be something coming from us
9 first, something on the record.

10 JUDGE GRIMES: If we want an actual supplemental brief,
11 we'll send a request.

12 JUDGE SCHEINER: Otherwise, you'll hear from us in the
13 normal course.

14 MR. DAVIDSON: Meanwhile, I'll look for the issue in case it's
15 needed. If it's out there.

16 JUDGE LINCK: Thank you.

17 MR. DAVIDSON: Yes, ma'am. Thank you. Thank you for
18 your time.

19 JUDGE SCHEINER: Thank you for coming in.

20 (Whereupon, the proceedings at 10:23 a.m. were concluded.)